STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: INTERSTATE POWER AND LIGHT COMPANY	DOCKET NO. P-850

ORDER AFFIRMING PROPOSED DECISION AND ORDER GRANTING PERMIT AND WAIVER

(Issued November 17, 2003)

PROCEDURAL HISTORY

On October 8, 2002, Interstate Power and Light Company (IPL) filed with the Utilities Board (Board) a petition for a permit to construct, operate, and maintain a natural gas pipeline serving Muscatine, Iowa. The petition was identified as Docket No. P-850. The petition is for an existing pipeline built in 1980 and 1982 for which a permit was never requested or granted. The pipeline consists of approximately 3.1 miles of eight-inch and 0.1 mile of four-inch diameter pipe with a maximum allowable operating pressure of 275 psig (pounds per square inch gage).

On July 23, 2003, the Board assigned this docket to an administrative law judge (ALJ). On July 28, 2003, the ALJ issued an order establishing a procedural schedule and setting a date for an evidentiary hearing. A hearing was held on September 4, 2003, and on September 11, 2003, the ALJ issued a "Proposed Decision and Order Granting Permit and Waiver" (Proposed Decision). In the Proposed Decision, the ALJ granted the petition for a pipeline permit, granted a

waiver of 199 IAC 10.14(2) relating to railroad crossing angles; and determined that a civil penalty should not be imposed on IPL for its failure to obtain permits in 1980 and 1982. (Proposed Decision, pp. 18-19.).

On September 22, 2003, an appeal of the Proposed Decision was filed by the Consumer Advocate Division of the Department of Justice (Consumer Advocate) challenging the decision not to assess civil penalties.

Subrule 7.8(2) provides that responses to the notice of appeal shall be filed within 14 days of the date the notice of appeal is filed. IPL filed a response on October 20, 2003, and a reply on October 24, 2003. Both of these filings are beyond the time allowed by the Board's rules for a response and reply. In addition, the filings were made after the Board's order establishing the issue to be considered on appeal, issued October 9, 2003.

The Board, in the October 9, 2003, order, stated that the issue to be considered on appeal: "Should IPL be assessed a civil penalty for not obtaining a permit to construct the pipeline in question as required by Iowa Code § 479.5?" The Board has reviewed the evidence and renders the following decision.

DECISION

The evidence is not conclusive that a permit was required for the portion of the pipeline constructed in 1980. There is no probative evidence concerning the pressure at which the pipeline was operated between 1980 and the construction of the extension in 1982. There appears to be no dispute that IPL was required by

Board rules to file a petition for a permit when the pipeline was extended and the operating pressure was increased in 1982 to more than 150 psig.

The Board's rule in effect during 1980 and 1982, 250 IAC 10.14(490), was adopted by the Iowa State Commerce Commission (ISCC), the predecessor of the Board, on July 1, 1975. This rule required that a petition for a permit be filed for any pipeline operating over 150 psig. The subrule stated as follows:

> 250—10.14(490) Distribution mains. No petition need be made for a permit to construct, operate or maintain a gas main or distribution main as technically defined in ASA B31.8—1963 and which will be operated at a pressure of less than one hundred fifty pounds per square inch.

This rule was amended on May 10, 1995, and renumbered as 199 IAC 10.16. The current rule provides:

> 199—10.16(479) When a permit is required. A pipeline permit shall be required for any pipeline which will be operated at a pressure of 150 pounds per square inch gage or more, or which, regardless of operating pressure, is a transmission line as defined in ASME B31.8 or 49 CFR Part 192. Questions on whether a pipeline requires a permit are to be resolved by the board.

There is no dispute that IPL did not discover it had failed to obtain a permit for the pipeline until August 2002 and IPL contacted Board staff about the problem immediately after discovering it. The record shows that IPL then filed a petition for a permit for the pipeline on October 8, 2002. Staff inspectors and IPL witnesses testified that, as of the date of the hearing, IPL had not found any other pipelines which should have received a permit and that IPL complied with all Board safety rules regarding the pipeline in question.

Based upon this evidence, the ALJ concluded that IPL should not be subject to a civil penalty for operating the pipeline without the required permit. The ALJ recognized that Iowa Code § 479.31 provides for civil penalties when a person violates chapter 479 or a Board rule adopted pursuant to that chapter. (Proposed Decision, p. 17.) The ALJ also recognized that IPL violated chapter 479 by building the pipeline without a permit. (Id.) However, the ALJ determined that when IPL discovered the situation, IPL reported it to the Board promptly and filed a petition for a permit shortly thereafter. The ALJ reviewed the steps taken by IPL to ensure future pipelines will not be constructed without a permit. The ALJ also considered the fact that IPL did not have any other known violations of this nature; that IPL constructed, operated, and maintained the pipeline in conformance with all other Board rules; and that there is no safety issue associated with the pipeline. Finally, the ALJ considered the fact that this violation was committed over 20 years ago by IPL personnel who no longer work for IPL. Considering all of these facts, the ALJ concluded that a civil penalty would not serve a valid punitive or deterrent purpose and determined that no civil penalty should be assessed.

Consumer Advocate argues the ALJ's decision is not consistent with the Board's decision in Re: Corn Belt Power Cooperative, Docket No. E-21519, issued August 28, 2003, in which the Board imposed a civil penalty. Consumer Advocate cites the Board's decision, which states:

> By bringing this action and assessing this fine, the Board puts all companies on notice that franchise requirements must be followed. However, the Board recognizes that there are some violations that may have occurred many years ago that have only recently been detected. The

> Board encourages all companies to report such violations immediately and to cooperate with the Board's staff in remedying such violations. Any penalties that may be imposed would likely be mitigated if the violations are self-reported and not discovered by the Board staff.

Consumer Advocate argues that the Board chose the word "mitigated" deliberately and the word is distinguished from the word "exonerated," but the ALJ in effect abolished the distinction between the two words. Consumer Advocate contends that by mitigating the penalty to zero, the ALJ has, in effect, exonerated IPL for its violation of the Board's rules.

Consumer Advocate argues that the two facts cited by the ALJ to support the zero penalty (first, that the violation occurred years ago, and second, that this is the first known violation by IPL) should only mitigate the penalty. Consumer Advocate suggests that not assessing a penalty in this case reduces the seriousness of the violation and nothing in the Corn Belt decision suggests that a first-time violator should get a "free pass."

The Board finds that the ALJ's decision is consistent with the decision in the Corn Belt case. The evidence supports the ALJ's findings that IPL's actions fully mitigated imposition of a civil penalty. This is consistent with the Board's decision in Corn Belt regarding self-reported violations that occurred many years ago.

When IPL found the violation, it immediately reported the violation to Board staff. IPL soon thereafter filed a petition for a permit for the line. The violation occurred over 20 years ago and IPL has complied with applicable safety rules for the

pipeline during that time. Each of these circumstances supports the decision to fully mitigate any civil penalty.

Cases of this nature are very fact-sensitive. Minor changes in the facts and circumstances may make significant changes in the outcome. Even in this case, the Board is concerned that it took IPL 20 years to discover this violation. However, that concern is at least partially alleviated by the ALJ's finding that, as of the date of the hearing, IPL had established a centralized process for review of gas pipeline permits and, based on that review, IPL had not identified any other situation in which IPL constructed a pipeline without first obtaining a permit. (Proposed Decision, Findings of Fact Nos. 18 and 20.) Any future cases will be judged on their own merits.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Proposed Decision And Order Granting Permit And Waiver" issued on September 11, 2003, is affirmed.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 17th day of November, 2003.